VIRGINIA
LAW REVIEW

VOL. VIII. MAY, 1922 No. 7

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN VIRGINIA.[1]

1. INTRODUCTION.

(a) *The Problem and Its Importance.*

FEW fields present problems (that cry out for prompt and proper solution) of such grave and growing legal interest as the field of judicial review of administrative action. In the United States, the resounding echoes of the Ju Toy[2] decision (when such a review was denied in an immigration case) were neither faint nor far when rumblings began, gradually increasing in violence, over the Ben Avon[3] case where, in the more important field of rate regulation, the necessity of the completest judicial review was vigorously (almost vehemently) insisted upon. Even in staid England the Arlidge[4] case speedily became a *cause célèbre*, while other cases[5] involving simi-

[1] The scope of this article is not so wide as its title may indicate. It is confined to the direct review by the Virginia Supreme Court of Appeals of the decisions of the Virginia State Corporation Commission. An attempt has been made to discuss every case in this limited field decided before March 1, 1922. A list of these cases (42 in number) is given near the end of the article in note 235. This list does not include cases taken from the lower Virginia Courts to the Virginia Supreme Court of Appeals in which the action of the Corporation Commission is involved. Such a case, for example, was Winfree *v.* Riverside Cotton Mills, 113 Va. 717.

[2] United States *v.* Ju Toy, 198 U. S. 253.

[3] Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287.

[4] Local Government Board *v.* Arlidge, [1915] A. C. 120.

[5] *Re* Feldman, 71 J. P. 269; Rice *v.* Board of Education, [1911] A. C. 179; Stock *v.* Midwives Board, [1915] 3 K. B. 756; Inland Revenue

lar questions intrigued the interest and puzzled the learning of the British bench and bar. Administrative Law (so called) has in recent vigorous growth far outstripped the proverbial bay tree.[6] Of the making of many articles on the subject[7] there is (naturally and normally) no seeming end; while judicial decisions in this field already bid fair to out-number the storied leaves that strew the brooks of Vallombrosa.[8]

The decisions of the Federal Supreme Court have been acutely studied and aptly summarized.[9] But data in still other fields are needed lest we fall into either hasty speculation or unripe generalization. Apparently there exists in Administrative Law a real need for intensive studies (throughout the States) of the actual operation of judicial review in limited jurisdictions and over specified tribunals or officers. The restricted field presents more adequate opportunity for what might be called the totality of legal envisagement. In each smaller horizon, the juridical perspective, perhaps, is apt to be clearer: the legal vision, focused on a closely circumscribed area, may, perchance, be less likely to suffer from the twin sins of myopia and astigmatism. When the results of many of these studies are assembled, we may thereby be enabled to rend slightly the over-dark

---

Commissioners *v.* Sanson, [1921] 2 K. B. 492; Everett *v.* Griffiths, [1921] 1 A. C. 631.

[6] See DICEY, THE DEVELOPMENT OF ADMINISTRATIVE LAW IN ENGLAND, 31 Law Quart. Rev. 148. This growth of the so-called *droit administratif* in America is grievously lamented in some quarters. Among the most outspoken American Jeremiahs is Mr. Hannis Taylor. See his article in 24 Yale Law Journal 353, 369.

[7] See, for example, 29 Yale Law Journal 369 (Green); 30 Yale Law Journal 781 (Isaacs); 30 Yale Law Journal 681 (Hardman); 31 Yale Law Journal 24 (Jethro Brown); 31 Law Quarterly Review 148 (Dicey); 35 Polit. Sc. Quart. 411 (Powell); 4 Ill. L. Quart. 44 (Green); 27 W. Va. L. Quart. 207 (Freund); 22 Harvard Law Rev. 260 (Powell); 34 Harvard Law Rev. 862 (Curtis); 35 Harvard Law Rev. 127 (Albertsworth); 22 Columbia Law Rev. 209 (Hale).

[8] This statement can be verified by a casual inspection of contemporary State and federal reports, or even more quickly by a rapid glance at recent digests.

[9] See 35 Harvard Law Rev. 127 (Albertsworth); 30 Yale Law Journal 781 (Isaacs). Quite naturally these decisions are quoted and analyzed in all serious discussions on this subject, whether these discussions be imbedded in text-books, legal articles or judicial decisions. The decisions of State courts are not nearly so well known.

curtain that hides the administrative future and thus to see in somewhat sharper outline the dim vista of legal years that lie spread out before us.

(b) *Virginia.*

Virginia is properly and quite universally deemed a southern State. Yet few realize that, though its eastern boundary is the Atlantic Ocean, its westernmost point is west of Detroit; while the northernmost corner is north of San Francisco, Kansas City, Cincinnati, Baltimore, the Southern Boundary of New Jersey and more than four-fifths of the State of Delaware. The topography of Virginia presents wide variations. It has, besides the Atlantic Ocean, one enormous bay (Chesapeake), at least four important navigable rivers (James, York, Rappahannock and Potomac), two great mountain ranges (Blue Ridge and Alleghany), and one broad and fertile valley (Shenandoah).

In railroads it is blessed with great trunk lines crossing the State both from North to South and East to West (Southern, Atlantic Coast Line, Seaboard Air Line, New York, Philadelphia and Norfolk, Richmond, Fredericksburg and Potomac, Baltimore and Ohio, Chesapeake and Ohio, Virginian, Norfolk and Western) with such admirable connections that through sleeping-cars operate daily from Virginia to such distant points as New York, Chicago, St. Louis, Memphis, New Orleans and Palm Beach. Its water-borne traffic is considerable on ocean, bay and river.

On the agricultural side, Virginia raises not only the staple crops, such as corn, oats and wheat, but also the more distinctively southern crops of cotton and tobacco. The mining interests of Virginia, particularly coal, are far from negligible, and in industry and commerce the State's interests are important and varied. It has two flourishing cities with a population of more than 100,000: Norfolk, a great seaport, and Richmond, an important industrial and banking centre, the home of a regional Federal Reserve Bank. The State boasts of an unusually homogeneous population and an unbroken and ancient historical tradition running back of, and beyond, even Plymouth Rock.

(c) *Jurisdiction of the Virginia State Corporation Commission.*

"The State Corporation Commission" (of Virginia) "to consist of three members" was "created" by the Virginia Constitution of 1902.[10] The powers of this Commission [11] are broad in their scope and varied in their nature. In terms the Commission succeeds to the "rights and powers" of "the Railroad Commissioner and the Board of Public Works".[12] It issues "Charters and amendments and extensions thereof, for domestic corporations, and all licenses to do business to foreign corporations," and is further charged with carrying out the laws for the "visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State".[13] The further power is conferred on the Commission "of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies", and the Commission "shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just".[14]

In the field of taxation, the Commission has important duties in ascertaining the value of the property of public service companies [15] as well as the amount of their annual "gross transportation receipts" [16]; and the Commission may as to any "char-

[10] § 155. For excellent article on the Virginia State Corporation by Hon. A. C. Braxton, see 10 Virginia Law Reg. 1. The present article deals only with the judicial review of the activities of the Commission.

[11] The State Corporation Commission of Virginia will hereafter be referred to as "the Commission"; and the Supreme Court of Appeals of Virginia will be designated as "the Court".

[12] Va. Const. (1902), § 156 (a).

[13] Va. Const. (1902), § 156 (a).

[14] Va. Const. (1902), § 156 (b). This section gives the Commission very wide inquisitorial powers as to inspecting the books of, and requiring reports from, such companies. The Commission can also prescribe rates, charges and classifications and can make and enforce requirements, rules and regulations. Duties of mediation between such companies and their patrons are also imposed upon the Commission.

[15] Va. Const. (1902), § 176; Va. Code (1919), §§ 2207-8. For powers of the Commission as to taxation of lands, see Va. Code (1919), §§ 2236-2240.

[16] Va. Const. (1902), § 178.

ter tax or fee", grant relief to Corporations from excessive or erroneous taxation.[17] Public utility companies are also subject to the general control of the Commission.[18] There are various other powers (of the same general nature as those outlined) conferred upon the Commission by statutes found in various chapters of the Virginia Code.[19]

(d) *Appellate Jurisdiction of the Virginia Supreme Court of Appeals over Orders of the State Corporation Commission.*

The original provision in the Virginia Constitution gave an appeal "from any action of the Commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company";[20] but the Constitution provided "The General Assembly may also, by general laws, provide for appeals from any other action of the Commission",[21] and the Legislature was further empowered "upon recommendation of the State Corporation Commission" to amend the sub-sections of the Constitution dealing with appeals from decisions of the Commission.[22] The

[17] Va. Code (1919), § 3775.

[18] Va. Code (1919), §§ 4064-4073. See further Va. Code (1919) § 3902 giving to persons aggrieved by failure of public service corporations to obey any law the right to relief by petition to the Commission. See also Acts 1920, p. 232 as to power of Commission to regulate power, heat, light and water corporations. See, too, Acts 1918, pp. 413, 673.

[19] Among the most important of these statutes in the Virginia Code of 1919 may be mentioned: § 3716, amended by Acts 1920, p. 410 (general); § 3746 (granting of charters); §§ 4092, 4096 (turnpikes); § 2069 (toll bridges); §§ 4099-4101, 4105, 4120, 4131 (banks); § 4169 (insurance); §§ 4052-4057 (telegraph and telephone companies); §§ 3717, 3736, 3737, 3774, 3904, 3905 [amended Acts 1920, p. 234], §§ 3906-3911, 3925-3928, 3932 (transportation companies); §§ 1765, 3972, 3974, 3984, 3986, 3988, 3989, 3993, 4001-4003 [also Acts 1918, p. 452] (railroad companies); § 4163 (building and loan associations).

[20] Va. Const. (1902), § 156 (d). Appeals are also provided for "refusing to approve a suspending bond or requiring additional security thereon or an increase thereof" in connection with appeals.

[21] Va. Const. (1902), § 156 (d).

[22] Va. Const. (1902), § 156 (l). The subsections which the legislature is authorized to amend are § 156, "sub-sections (a) to (i) inclusive". Only sub-sections (*d*) to (*h*) inclusive deal with appeals from the Commission.

Legislature has, accordingly, provided: "The Commonwealth or any party aggrieved by any final finding, order, or judgment of the Commission shall have, of right, regardless of the amount involved, an appeal to the Supreme Court of Appeals"; [23] and even broader is the legislative provision: "An appeal shall lie from any order or decision of the State Corporation Commission to the Supreme Court of Appeals at the instance of the applicant or of any party in interest".[24] The Supreme Court of Appeals, besides the statutory appeal, may issue writs of prohibition and mandamus to the Commission, while the problem of judicial responsibility for, and control over, the decisions of the Commission is further simplified by a Constitutional provision forbidding any other courts "of this Commonwealth from interfering with any action of the Commission within the scope of its authority".[25]

(e) *The Problem of Judicial Review of Administrative Action in Virginia Is Typical and Normal.*

The brief description given above of the cosmopolitan geography and varied interests of Virginia was penned neither from a desire to glorify this State nor from what are known as Chamber of Commerce considerations. Rather was Virginia thus catalogued to show that the wide range of its institutions and traditions would tend to present the problem of judicial control of administrative action in broad and catholic rather than narrow and provincial aspects. In such a State, then, the Vir-

[23] Va. Code (1919), § 3734.

[24] Va. Code (1919), § 3833. See Jones *v.* Rhea (Va.), 107 S. E. 814. See also Va. Code (1919), §§ 6336, 6337. As to review of the decisions of the Commission in contempt proceedings, see Va. Code (1919), § 3728.

[25] Va. Const. (1902), § 156 (d). The powers given to the Court are so liberal that it is somewhat to be regretted that the Constitution should have tied the hands of the Court by a provision: "In no case of appeal from the Commission shall any new or additional evidence be introduced in the appellate court". § 156 (f). This provision is utterly opposed to the spirit of modern procedural reform. When the necessity of trying a case again in the lower tribunal can be obviated (thereby saving both delay and expense) by evidence before an appellate court that is often (as in the case of an official record) readily obtainable, such provisions are quite unfortunate. This is admirably demonstrated by PROF. SCOTT, FUNDAMENTALS OF PROCEDURE, pp. 104, 161.

ginia Corporation Commission with far reaching powers has functioned for nearly two decades. During all this period a single court has been exclusively charged with the power and responsibility of reviewing the decisions handed down by the Commission. The problem, then, under these circumstances would seem to be presented, divorced from adventitious factors, in admirable clearness and unusual simplicity. Virginia's experience should tend to be quite typical and altogether normal.

2. General Regulation of Railroads and Street Railways.

(a) *General Considerations.*

Cases on the general regulation of railroads and street railways (apart from taxation and rate regulation which will be subsequently treated) comprise nearly one half of all the cases decided by the Court. This, though, seems to have been contemplated as well by the framers of the 1902 Constitution as by subsequent legislatures. Indeed to curb the activities of railroads, without unfairly discriminating against them, seems to have been the chief reason for the creation of the Corporation Commission.[26]

(b) *Interstate Commerce.*

Early conflict (or at least contact) with the interstate commerce clause of the Federal Constitution was inevitable. Indeed the first two [27] reported cases lay in this field. By virtue of authority conferred on it by the Virginia Constitution and Statutes, the Commission promulgated some twenty rules governing transportation companies and shippers within the State. These rules *en masse* were promptly and vigorously attacked by the railroads (with a vast array of counsel) as an unwarranted interference with interstate commerce.[28] This broadside at-

[26] See Va. Const. (1902) and Va. Code (1919) *passim*. See also article 10 Virginia Law Reg. 1.

[27] Old Dominion S. S. Co. *v.* Commonwealth, 102 Va. 576 (affirmed 198 U. S. 299) will be considered under "Taxation". This was the first reported case.

[28] Atlantic Coast Line Ry. Co. *v.* Commonwealth, 102 Va. 599. Of course a minor rôle in this controversy had to be assigned to the hard-working 14th Amendment.

tack failed, the Court sustaining the Commission, on the ground that the Court "ought not, upon this appeal to attempt to decide to what extent, if at all, the said rules and regulations, in their operation, may directly infringe upon the commerce clause of the Constitution of the United States, or violate any right of the appellants under that instrument, and that the decision of these questions can only be properly made as they arise in concrete cases, and upon the particular facts of each case".[29] Thus instead of a single battle all along the line, the campaign was to be fought out in a series of skirmishes.

But the railroads were quite successful in the first important skirmish, furnished by the next case. Rule 1 (of the series thus upheld) required a railroad company (under penalty for a violation) on application of a shipper, to furnish cars within four days from such application. Acting largely on the authority of *Houston, etc., Ry. Co.* v. *Mayes,*[30] the Court reversed the Commission and held this rule, in so far as it applies to interstate shipments, invalid as an unreasonable burden on interstate commerce.[31]

In *Washington, etc., Ry. Co.* v. *Royster Guano Co.,*[32] the petitioner sought to compel the defendant railroad to extend a spur track. Both Court and Commission made short shrift of the defense that the spur track was used in interstate commerce. Both interstate and intrastate commerce passed indiscriminately over the spur track, and the Court emphatically upheld the Commission's apt observation: "If this defense be

[29] 102 Va. 1. c. 619. Such a concrete case arose in Southern Ry. Co. *v.* Commonwealth, 107 Va. 771, in which the Court (reversing the Commission) held the particular rule invalid as an unreasonable interference with interstate commerce.

[30] 201 U. S. 321. Of the eight justices who sat in this case, three dissented. In this case, a Texas statute similar to Rule 1 was declared invalid.

[31] Southern Railway Co. *v.* Commonwealth, 107 Va. 771. Three opinions were filed in this case. All the judges agreed in the result, but three judges (in two opinions) insisted on the right of the Commission to make valid regulations on car service for even interstate shipments provided these regulations were reasonable. Problems of interstate commerce are also involved in cases of taxation and rate regulation subsequently discussed.

[32] 122 Va. 397.

valid, then this Commission is without jurisdiction to deal with any railway facility located in this State, because practically all railway facilities are used both for interstate and intrastate commerce".[33]

(c) *Public Duties.*

The Virginia Constitution [34] gives the Commission supervision over transportation companies "in all matters relating to their public duties and their charges therefor". This obviously involved a definition of "public duties".

The Commission ruled that placing cars on private track scales, in position to be weighed by a railroad company engaged in handling cars along its route from the terminus of one railroad to the terminus of another, and to and from the various industries with which it has established switching connections, is cognate to, and so intimately connected with, the carriage and delivery of freight by railroad companies to patrons along its route, as to constitute a part of such public service. The Court, decrying too narrow a definition of the term, distinguishing the circus car and express car cases and citing a long line of cases running back even to the Slaughter House Cases, upheld the Commission.[35]

In the spur track case previously discussed, a like decision, in a case seemingly not so clear was reached.[36] The duty owed to the petitioner to furnish him facilities "equal to those of his competitors in business" [37] was classed as a public duty, while it

[33] 122 Va. l. c. 402. The case of Washington, etc., Ry. Co. *v.* Commonwealth, 112 Va. 515, involving interstate considerations in intrastate rate regulation will be subsequently considered under rate regulation.

[34] Va. Const. (1902), § 156 (b).

[35] Norfolk, etc., Belt Line Ry. Co. *v.* Commonwealth, 103 Va. 289. An interesting question in this connection is presented by the case of Augusta County, etc., Telephone Co. *v.* Staunton, etc., Telephone Co. (now pending before the Virginia Supreme Court) involving the question whether the Commission has jurisdiction over a telephone company operated on a purely mutual basis and not for hire, the service being rendered only to members who are assessed with dues sufficient to cover the operating expenses and no other charge is made for the service rendered.

[36] Washington, etc., Ry. Co. *v.* Royster Guano Co., 112 Va. 397. Neither the Belt Line Case (note 35) nor the Danville, etc., Ry. Co. Case (note 38) was cited by the Court.

[37] 122 Va. l. c. 403.

was further pointed out that the spur track benefitted other shippers owning contiguous warehouses and, to a less extent, the general public.

But in *Danville, etc., Ry. Co.* v. *Lybrook*,[38] the Court (reversing the Commission's order) pointed out that the Commission cannot "undertake to remove individual inconveniences to shippers such as are complained of here, so long as the carrier or public service corporation affords reasonable facilities for the reception and delivery of freight for the general public and denies no individual or individuals an essential right".[39] The Court found (on the evidence) that the buildings which the petitioners sought to have removed "facilitate rather than hinder appellant in the performance of its duties as a common carrier".[40] The buildings in question did constitute a peculiar advantage to certain shippers, but the only inconvenience they seem to have caused (limiting the facilities for camping wagons and feeding horses) lay beyond the field of the carrier's public duties.[41]

(d) *Duties under Contract, Ordinance and Statute.*

In two cases involving the duty of railroads under contracts, the Court saw fit to reverse the Commission for over-zealousness in holding the railroads up to their contracts.

In the first case,[42] the railroad agreed to provide for persons living south of the James River facilities for transportation to the railroad line on the north bank of the river at least equal to those afforded by its predecessor (another railroad company). The then facilities consisted of a pond formed by a dam. The Legislature (acting under the police power) cut down this dam

[38] 111 Va. 623. The Court did not refer to the previous Belt Line Case, 103 Va. 289.

[39] 111 Va. l. c. 635-6.

[40] 111 Va. l. c. 630.

[41] Though not a railroad case, see Newport News, etc., Co. *v.* Peninsular, etc., Co., 107 Va. 695, in which the Court held the Commission had no power to interfere in the dispute of two water companies for an alleged tort by one when there was no public interest at stake. Other cases under this sub-section are discussed later in connection with the jurisdiction of the Commission.

[42] Chesapeake & Ohio Ry. Co. *v.* Commonwealth, 105 Va. 297.

but declared the railroad company exempt from liability arising out of cutting down the dam. Since the railroad contract was not to furnish proper facilities but was purely *comparative* and the pond remained (though somewhat changed by the removal of the dam), the Court reversed the order of the Commission requiring the railroad to build a bridge across the river.

The next case [43] involved a more complex set of facts and relations, though the undertaking in question by the lessee railroad (to run its trains into the town of Strasburg) was simpler. The lessee was held up to its contract, the Court refusing to recognize as a defense either the fact that the trains would be operated at a loss or the fact that the lessor railroad could not financially meet this obligation. The Commission was reversed on the ground that since there were two lawful methods of carrying out the contract, the order was defective in specifying only one of these methods.

The City of Richmond furnished two related street-railway cases involving duties arising out of city ordinances.

A street railway sought relief from its obligation under an ordinance requiring it to sell labor tickets at reduced rates and to give transfers (without additional charge) over connecting lines. The Court (adopting the opinion of the Commission) gave a liberal construction to the word "lines", and, commenting on the growth of outlying suburban sections, on the basis of the labor ticket and transfer privilege, denied the relief sought.[44]

Commonwealth (ex rel. Dowden) v. *Richmond and Rappahannock River Railway* [45] grew out of this case, though the stage was differently set. After the earlier decision, the Va. Ry.

[43] Winchester, etc., Ry. Co. *v.* Commonwealth, 106 Va. 264. This case is discussed later in connection with procedure. For discussion of this case involving the validity of the Commission as a combination of legislative, executive and judicial powers, see Henrico County *v.* City of Richmond, 106 Va. 282, 293.

[44] Va. Passenger & Power Co. *v.* Commonwealth, 103 Va. 644. As an outgrowth of this case, in connection with student tickets, see Northrop (*et al*) *v.* City of Richmond, 105 Va. 335, and Northrop (*et al*) *v.* City of Richmond, 105 Va. 341. The conflict between municipal regulation of public utilities and the jurisdiction of the Commission is much more acute in rate cases, some of which are subsequently discussed.

[45] 115 Va. 756.

and Power Co. had transferred its lines beyond the City to the Richmond and Rappahannock River Railway Co. (defendant in the present case) and an ordinance had relieved the Railway and Power Co. from the obligation to accept transfers from travelers entering the City. The Commission had jurisdiction, though, of the transfer service beyond the City limits. Since the two services (within the City and outside the City) were interdependent it was held "unjust and inequitable" [46] to require the defendant company to honor transfers held by travelers leaving the City, when the same travelers making the same trip in the opposite direction were compelled to pay the extra fare to the Railway and Power Co. on entering the City.

Three cases involving the rights and duties of railroads under statutory and constitutional provisions will close this subtitle.

The State of Virginia is a shareholder in the Richmond, Fredericksburg & Potomac Railroad. The Legislature (under Constitutional warrant) forbade the building of any railroad parallel to the line of this railroad. In *Wheelwright* v. *Com-*

[46] 115 Va. l. c. 762. This case is interesting as showing the interdependence of transportation services. The problem here, with the Commission's jurisdiction limited to extra-city service (intra-city service was controlled by ordinance) is similar to the difficulties of States as to intrastate and interstate commerce. See (discussed later under rate regulation) Washington, etc., Ry. Co. *v.* Commonwealth, 112 Va. 515.

The Court, in the instant case, (115 Va. 1. c. 763) said: "The interests and *motives* of the appellee companies (in discontinuing transfers) *cannot*, however, affect the legal rights of the parties to this case." This is stated without any citation of authorities, and without discussion of its relation to the facts of the case as an axiomatic principle of law. The Court ignores the doctrine of the abuse of rights around which a vast literature has accumulated. See Quinn *v.* Leathem, [1901] A. C. 495; Wheatley *v.* Baugh, 25 Pa. St. 528; Katz *v.* Walkinshaw, 141 Cal. 116; Chesley *v.* King, 64 Me. 164.

For discussions of this doctrine, see Motive as an Element in Torts in the Common and in the Civil Law (Walton), 22 Harvard Law Rev. 501; How Far an Act may be a Tort because of the Wrongful Motive of the Actor (Ames), 18 Harvard Law Rev. 411; JUSSERAND, DE L'ABUS DES DROITS; PLANIOL, TRIATE ELEMENTAIRE DE DROIT CIVIL. (4th Ed.) II, nos. 870, 871; BELL, PRINCIPLES OF THE LAW OF SCOTLAND, 966; DERNBURG, PANDEKTEN, I, 34; German Civil Code, § 226: "The exercise of a right is not permissible when the only possible object is to cause damage to another."

monwealth,[47] the Court very properly held that statutes limiting legitimate industry should be strictly construed and that the statute in quesion was not violated by granting a Charter to a railroad which would parallel the line of the above railroad only for about twenty miles out from the City of Richmond, and which would then reach out to other points in the State not provided with railroad facilities.

Emboldened by its recognized powers as *accoucheur* to preside at the birth of corporations, the Commission (in *Jeffries* v. *Commonweath*) [48] insisted on its right in the case of a public service corporation (here a railroad) to act as doctor, coroner and undertaker. Without its permission, the Commission claimed, no public service corporation could take its own corporate life; apart from such consent, those corporations were endowed with pseudo-immortality. The jurisdiction of the Commission to prevent the suspension of service by a public service corporation, while it retained its corporate life, was freely conceded. In an elaborate opinion, after an involved study of the Virginia Constitution, the Court (assisted in its conclusion by an even dozen lawyers) decided (reversing the Commission) that a public service corporation, created under the laws of Virginia, has the same right of voluntary dissolution which is accorded to all other business corporations. When bidden to the obsequies, the Commission must attend, but only in a purely ministerial capacity.[49]

The conflicting jurisdictions of State and County, of the Commission and local supervisors, over railroads and county roads were acutely involved in *Southern Railway* v. *Common-*

[47] 103 Va. 512. This decision technically reversed the order of the Commission denying the Charter. The Commission, however, (103 Va. 1. c. 515) was clearly of opinion that the Charter should be granted, but denied the Charter on the ground of the difficulty of revoking a charter once granted; whereas, if the Court, on appeal (which the Commission suggested) should reverse the order (as it did) denying the Charter, the issuance of the Charter would be simple and proper.

[48] 121 Va. 425.

[49] Compare Elliott's Knob Iron, etc., Co. *v.* Commonwealth, 123 Va. 63, (subsequently discussed) in which a private corporation claimed (to no effect) automatically to have committed corporate suicide. The Jeffries case, as to appeals from ministerial action by the Commission, is cited in Jones *v.* Rhea (Va.), 107 S. E. 814.

wealth,[50] when double-tracking the railroad obstructed a public highway. The Commission favored the construction by the railroad of a 45° underpass for the highway, but this involved the re-location of the highway, which the Commission had no power to order. The Court (in reality affirming but technically reversing the Commission [51]) entered an order [52] for the construction of the 45° underpass, "whenever the Board of Supervisors of Albemarle County filed with the Commission its consent in writing to such underpass".[53]

(e) *Conflicting Claims of Railroads over the Common Use of Physical Facilities.*

The Court has passed on Commission rulings in at least three cases when one railroad or street-railway company sought permission to cross the tracks of another.

In the first case,[54] the Commission, acting on the report of an expert engineer, granted permission to one street-railway company to cross with its tracks the tracks of another street-railway company at four different points within the classic form of Phoebus. The order of the Commission specified in great detail the method of constructing the crossing and the Court, with a graceful compliment to the Commission [55] (which at that time it had never reversed) affirmed the order.

In the first case involving the crossing of one railroad (as distinguished from a street-railway which was involved in the preceding case) by the tracks of another,[56] the Court decided

[50] 124 Va. 36.

[51] 124 Va. l. c. 64: "Costs will be awarded to the appellee as the party substantially prevailing."

[52] 124 Va. l. c. 64. In passing on the time within which the railroad must construct the underpass, the Court took judicial notice of "the great European war . . . and the consequent difficulty of getting materials of all kinds for railroad construction."

[53] Out of the same transactions here considered arose the case of Southern Ry. Co. *v.* Commonwealth, 128 Va. 176, involving "abandonment" or "re-location" of the station.

[54] Newport News, etc., Ry. Co. *v.* Hampton Roads, etc., Ry. Co., 102 Va. 847.

[55] 102 Va. l. c. 851: "The Commission in this matter has been untiring, most careful and painstaking in its efforts to ascertain all local conditions before making its finding."

[56] Norfolk & Western Ry. Co. *v.* Tidewater Ry. Co., 105 Va. 129.

the important point that the Commission determined merely the necessity for, the place where, and the manner of, such crossing; while the question of compensation is left to the Courts under the rules of eminent domain.[57] The Court (against a strong attack) sustained further the Commission's order for a crossing at grade: "To require the establishment of an overhead or underground crossing where it is not reasonably practicable and would involve an unreasonable expense, all the circumstances of the case considered, would be as much against the policy of the State as to permit a grade crossing where those difficulties are not shown to exist".[58]

The preceding decision disposed of many of the questions needlessly raised again in the next case,[59] in which the Court upheld the order of the Commission authorizing the construction not only of an overhead crossing but also of a connecting spur track. "It is plainly within the competency of the Commission," said the Court,[60] "to establish as many connections as may be reasonably necessary for convenient interchange of traffic and the accommodation of both roads and the public".

Involved in the next two cases was the right of one railroad company to use the facilities, or to condemn the property, of another.

The citizens of the town of Norton petitioned the Commission to grant to the Interstate Railroad Company the right to use the depot of the Norfolk and Western and Louisville and Nashville Railroads. Without going into the due process clause of the Federal Constitution, the Court denied the petition as being beyond the Commission's powers under a Virginia statute, which, prescribing the duties of transportation companies, provided that the statute "shall not be construed as requiring any such company . . . to give the use of its track or terminal facilities to another company engaged in a like business".[61]

---

[57] The compensation questions arising out of this crossing were decided in Norfolk and Western Ry. Co. *v.* Virginian Ry. Co., 110 Va. 631.

[58] 105 Va. l. c. 137, 138.

[59] Louisville & Nashville Ry. Co. *v.* Interstate Ry. Co., 107 Va. 225.

[60] 107 Va. l. c. 227.

[61] 111 Va. 59. The Court held that the rights of the parties as to any joint use of station facilities should be worked out by contract between the corporations involved but that the Commission lacked authority to make such a contract for the parties.

Whereupon the same Interstate Railroad Co. (not lacking in resourcefulness) proceeded to seek by petition to the Commission the right to take for its depot and other facilities in Norton certain property of the other railroads by condemnation proceedings.[62] The statute (in such cases made and provided) required the Commission to give its permission and to "certify that a public necessity or an essential public convenience shall so require", while one corporation was forbidden to take by condemnation "property owned by and essential to the purposes of another Corporation possessing the power of eminent domain". The Commission's finding that there was "an essential public convenience" and that the property in question was not "essential to the purposes" of the railroads then owning it was (with a pretty compliment to the Commission) [63] affirmed by the Court.

This same statute [64] was involved in a case in which an electric railway company sought to condemn the property of a power company.[65] Though the Court seemed to think the property essential to the power company,[66] the decision denying the right of condemnation was based on the point that mere scenic advantages to the public (however great [67] and however profitable to an electric railway company) did not constitute (though the Commission so thought) the required "public necessity" or "essential public convenience".

---

[62] Norfolk & Western Ry. Co. *v.* Interstate Ry. Co., 114 Va. 789.

[63] 114 Va. l. c. 795: "We are unable to see how the Corporation Commission could, with due regard to the rights of all parties including the public (!) [exclamation point mine] have reached a more just, reasonable and correct conclusion."

[64] Va. Code 1904, Ch. 46a, § 1105e, sub-div. 52.

[65] Great Falls Power Co. *v.* Great Falls, etc., Ry. Co., 104 Va. 416.

[66] 104 Va. l. c. 419.

[67] 104 Va. l. c. 420: "The property in question, however, covers a commanding view of the Great Falls of the Potomac River, which is shown to be one of the grandest pieces of natural scenery in this country, second only in beauty and attractiveness to the Falls of Niagara." The Court did not cite the celebrated Gettysburg battle-field case, U. S. *v.* Gettysburg Electric Ry. Co., 160 U. S. 668, in which the right of condemnation by the United States was upheld on patriotic and historical (not scenic) grounds.

(f) *Discontinuing or Abandoning Stations.*

"How forcible are right words", said Job,[68] in a dictum.

"A word", announced Mr. Justice Holmes,[69] "is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it was used." In the light of these maxims, Judge Saunders in *Southern Ry. Co.* v. *Commonwealth*,[70] proceeded to demonstrate how under certain circumstances the "re-location" of a railroad station (even in the same small community[71]) constitutes an "abandonment" of the old station and how the double-tracking of a railroad and the elevation of the roadbed upon the old right of way is not a "change in the location of the line". Having disposed of these verbal difficulties, the Court sustained the Commission's selection (after voluminous testimony and a personal visit) of the new site for the depot.

In the *Clayville Mfg. Co.* v. *Southern Ry. Co.* case,[72] the Commission's problem was simpler but sadder. It was conceded that one of two nearby stations [Dorset or Clayville] should be discontinued. But which? Dwelt there a Clayville man with imagination so dead as not to be able to produce a convincing array of facts and figures to show that the commercial prosperity of Clayville was inseparably bound up in that station? Were not the hopes and fears of all the Dorset years met in its station? The testimony and a personal inspection convinced the Commission of the justness of the claims of the men of Dorset. The Court again refused to disturb the finding, thereby indicating that the Commission functions (in good expert terms) at its peak of efficiency in locating and discontinuing stations.

---

[68] Chapter 6, verse 25.

[69] Towne *v.* Eisner, 245 U. S. 418, 425.

[70] 128 Va. 176.

[71] The distance here along the track from the old depot site to the new was 1475 feet.

[72] 114 Va. 356.

3. The Licensing and Taxation of Corporations.

(a) *Situs of Tangible Property for Taxation.*

In the first reported case in which the Court reviewed the Commission's ruling, an order was sustained which held that vessels of a non-resident corporation, enrolled at a port outside the State, engaged as a link in interstate commerce, plying solely between ports within the State, were taxable in Virginia.[73] This important decision was unanimously affirmed by the U. S. Supreme Court.[74]

The remaining cases under this sub-title involve a question which has greatly agitated the people and Legislature of Virginia: the *situs* (within the State) of the rolling stock of railroads and street railways.

In the first case, the Commission, while recognizing as settled the principle that the rolling stock of *railroads* (in the absence of statute) is taxable only at the principal office of the railroad,[75] undertook to distinguish the self-propelling coaches of an *electric railway* and to apportion the rolling stock of such an electric railway company for taxation between a city (Newport News) and a county (Elizabeth City) through which the line of the company runs. The Court held that the distinction (if any) between electrically self-propelled coaches and steam-drawn coaches, together with the seeming equity of the Commission's plan, should be addressed to the Legislature and (reversing the Commission) adhered to the ancient rule.[76]

The Commission's suggestion, however, did not fall on barren ground. The Legislature did pass an act apportioning the rolling stock of railroads for taxation among the cities, counties and districts through which the railroads ran;[77] but this act was held (by Court and Commission) to be repugnant to a

[73] 102 Va. 576. This decision (frequently cited) is of great importance not only on the general subject of the situs of tangible chattels for taxation but also on the narrow question of the taxable situs of steamboats.

[74] 198 U. S. 299.

[75] Orange, etc., Ry. Co. *v.* City Council of Alexandria, 17 Gratt. 176; Atlantic, etc., Ry. Co. *v.* Lyons, 101 Va. 1.

[76] Board of Supervisors of Elizabeth City County *v.* City of Newport News, 106 Va. 764.

[77] Act of March 12, 1912.

later act [78] providing for the taxing of such rolling stock in the City where the principal office of the railroad company is situated.[79]

But the advocates of apportionment, defeated but undaunted, were not to be denied. The last case under this sub-title [80] involved a later statute (passed at the next session of the Legislature) [81] expressly providing for the apportionment of the rolling stock of a "steam, electric and street railroad corporation" among the counties, cities, etc., "in and through which any part of any such railroad is located". The basis of such apportionment was "the ratio and proportion that the total assessed value of the right of way, roadbed, track and all other property (except rolling stock) of such railroad corporations, respectively, located in any such county, city, town or school district, bears to the assessed value of all such property (except rolling stock) of such railroad corporations, respectively". The opinion of the Commission (adopted by the Court) upheld the statute against an attack on various technical grounds, and sustained [82] the right of "the State to change the common law *situs* of rolling stock for taxation".[83]

---

[78] Act of March 13, 1912. The Virginia Legislature derives scant credit for its work in passing two inconsistent tax statutes, approved within a single day of each other, on so important a subject.

[79] Board of Supervisors of Henrico County (and others) *v.* Commonwealth (*ex rel.* City of Petersburg and others), 116 Va. 311.

[80] Commonwealth (*ex rel.* City of Richmond) *v.* Chesapeake & Ohio Ry. Co. (and others), 118 Va. 261.

[81] Acts 1914, p. 218. This statute was passed even before the decision of the Court in the preceding case was announced.

[82] Largely on the authority of Taylor *v.* Secor, 95 U. S. 575, and Southern Ry. Co. *v.* Wright, 157 U. S. 478. There were, of course, no interstate complications here.

[83] This question and cognate ones assume a far greater importance in the jurisdiction of States to tax the rolling stock or railroads, sleeping-car companies (and similar companies) operating over railroads extending through several States. Prof. Beale has published two excellent articles "The Jurisdiction to Tax", 32 Harvard Law Rev. 587, and "The Situs of Things", 28 Yale Law Journal 525. The proportional mileage plan approved in Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18 (1891), which has since been in quite general use, was repudiated by the U. S. Supreme Court in Union Tank Line *v.* Wright, 249 U. S. 275 (1919). This case is severely criticised by Prof. Beale, 33 Harvard Law

(b) *License Taxes.*

Four cases involved the important question of license tax on foreign corporations: the appellant in each case was a corporation with a far-flung business line coupled with enormous resources.

American Surety Co. v. *Commonwealth* [84] involved no question of broad general importance but turned on a rather technical consideration of the Virginia Constitution and tax laws together with the distinction between a charter fee (paid once for all) and a recurring "license tax, which is paid each and every year".[85]

A much more important problem was presented in the Standard Oil case.[86] The Virginia statute imposed a heavier tax [87] on "every foreign corporation *authorized by its charter* (italics mine) to exercise the powers of a transportation or transmission company" before it could do business in Virginia. The corporation did not seek to carry on the business of a public service corporation in Virginia and *could not* effectively carry on such business (under the Virginia Constitution) without a re-incorporation in Virginia involving the payment of an additional fee. Even if it be conceded, as Judge Harrison says,[88]

Rev. 6-7; it is commented upon in 19 California Law Rev. 334; and it is apparently approved in 28 Yale Law Journal 804. In the Virginia case, the railroad company interposed no objection to the apportionment plan, inasmuch as it paid the same tax under either plan. The dispute arose between the City in which the chief office of the railroad is situated and the counties and towns through which the railroad ran. All the rolling stock was subject to a simple taxing agency—the Virginia Legislature.

[84] 102 Va. 841.

[85] 102 Va. l. c. 843. The Court sustained the fine imposed on the appellant for transacting business in Virginia without having obtained a license.

[86] Standard Oil Co. *v.* Commonwealth, 104 Va. 683. The same opinion affirms the case of American Can Co. *v.* Commonwealth, 104 Va. 689.

[87] This tax (based on the maximum authorized capital) was $5000. The fine imposed by the Commission on the Corporation, for failure to pay this, was $10. This was affirmed by the Court.

[88] 104 Va. l. c. 687. Judge Harrison's opinion contains the following statement (104 Va. l. c. 685): "It will not be denied that a State has unlimited power in prescribing the terms and conditions upon which a foreign corporation shall be permitted to do business within her limits, and that, if she chooses, such corporations can be excluded entirely." It is

"Whether the criterion adopted be arbitrary or not, it is a method of determining the fee to be paid which the General Assembly chose to adopt, and had the right to prescribe", there is much force in the dissenting opinion of Keith, P., (in which Cardwell, J., concurred) that if such an inequitable result was contemplated we could at least expect that "it should have been clothed in less ambiguous terms".[89]

The last two cases under this sub-title involve the oft-litigated question of what constitutes doing business within a State.[90]

The General Railway Signal Co. (a New York Corporation) had contracts with the Southern Ry. Co. "to furnish certain materials, supplies, machinery, devices and equipment, as well as necessary labor and to install, erect and put in place certain signals and apparatus".[91] These contracts covered one hundred and forty-seven miles of railroad and a total but modest consideration of $214,040. The construction of the signals occupied many months. The Court had little difficulty holding that the Signal Co. was doing business in the State of a local character quite apart from interstate commerce,[92] going far be-

now very well settled that a State has not power to exclude a corporation which seeks to do within the State only interstate business, nor can a State impose unreasonable conditions upon a corporation seeking to carry on only interstate business. See Business Jurisdiction over Non Residents (Scott), 32 Harvard Law Rev. 871; HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chapters 6, 7, 8; International Text Book Co. *v.* Pigg, 217 U. S. 91; Sioux Remedy Co. *v.* Cope, 235 U. S. 197; Simon *v.* Southern Ry. Co., 236 U. S. 115; Sligh *v.* Kirkwood, 237 U. S. 52; International Paper Co. *v.* Massachusetts, 246 U. S. 135. Further qualifications of the statement might also be pointed out. See, too, the opinion of Kelly, J., in Dalton Adding Machine Co. *v.* Commonwealth, 118 Va. 563.

[89] 104 Va. l. c. 692. There is added force in this by virtue of the remark of McReynolds, J., quoted in note 93. Indeed, in the light of this remark, the validity of such a provision is at least arguable.

[90] For an exhaustive digest of such decisions, see Report of the Commissioner of Corporations on State Laws Concerning Foreign Corporations, [1915], 156-168. See also "WORDS AND PHRASES" under "Doing Business". A very recent case is Michigan Lubricator Co. *v.* Ontario Cartridge Co., 275 Fed. 902.

[91] General Railway Signal Co. *v.* Commonwealth, 118 Va. 301, l. c. 302-3. This case was affirmed by the U. S. Supreme Court, 246 U. S. 500.

[92] Reliance was chiefly based on Browning *v.* Waycross, 233 U. S. 16.

yond the mere completion of a sale or interstate transaction; while with even less discussion, the Court (supported by the definite language in *Baltic Mining Co.* v. *Massachusetts*[93]) held that an excise tax might be levied on the foreign corporation for the privilege of carrying on its purely local business and that this tax might be measured by the authorized capital of the corporation.

The Dalton Adding Machine case[94] was a sequel to an unsuccessful attempt to enjoin the Commission in the United States Courts.[95] The Virginia Court conceded the State's lack of power to impose any license tax on the corporation's purely interstate business but insisted that the corporation was doing besides an intrastate business which was subject to taxation by the State. An impressive and convincing enumeration of the acts of the corporation done within the State[96] led the Court to the conclusion that the corporation was doing a substantial local and intrastate business which was in no sense "commerce among the States".

---

[93] 231 U. S. 68. This license fee was sustained by the U. S. Supreme Court, though McReynolds, J., saw fit to remark "It seems proper, however, to add that the case is on the border line." 246 U. S. 500, 511.

[94] Dalton Adding Machine Co. *v.* Commonwealth, 118 Va. 563.

[95] Dalton Adding Machine Co. *v.* State Corporation Commission, 213 Fed. 889, affirmed 236 U. S. 699, when Holmes, J., refused to grant the injunction for fear that the State officers might perform their duties wrongly. There was also an adequate remedy at law.

[96] 118 Va. l. c. 575-6. These acts included:

(a) maintaining a stock of machines for exhibition and trial and their sale after they had become commingled with the general mass of property within the State;

(b) renting machines and collecting rents;

(c) buying and exchanging machines and the sale of the machines thus bought or exchanged;

(d) employing mechanics and repairing machines and collecting charges therefor;

(e) keeping on hand a stock of machine parts, paper and ribbons suitable for use on the machines, all freely sold from time to time by an agent in Richmond.

This case was affirmed (on writ of error) by the U. S. Supreme Court, 246 U. S. 498, when the Court merely quoted the above statement, said it was sustained by the record, and added seven words: "A material part of it (the business) was intrastate". 246 U. S. l. c. 500.

(c) *Exemption from Taxation.*

The apposite maxim as to tax-emptions seems to be the State giveth and the State taketh away, whereby whether the State be blessed or cursed becomes more or less immaterial. The maxim still applies (according to the Court and Commission in *Lake Drummond Canal, etc., Co.* v. *Commonwealth*) [97] though the giving be direct and the taking indirect. A canal company (chartered so far back in the 18th century that its tolls were fixed in Spanish milled dollars) received a generous (and apparently perpetual) exemption of its property from taxation. After varying vicissitudes and divers deeds of trust (which were foreclosed), the property was finally conveyed to appellant which became a corporation (the old company being *ipso facto* dissolved) and the purchasers by statute succeeded to "all such *franchises, rights* and *privileges* . . . as would have been had by the first company". Having *in limine* escaped the force of *The State of New Jersey* v. *Wilson*,[98] by distinguishing an Indian from a corporation (without any aspersions on either), the Court both quoted and demonstrated the principle that tax-emptions are always to be closely scrutinized and (if possible) minimized beyond the vanishing point to the absolute zero of science. The Court fortified its finding by citing a like holding in almost similar language in a West Virginia statute by Justice Matthews in *Chesapeake & Ohio Ry. Co.* v. *Miller* [99] and by recurring to the fact that the new company, which purchased under the foreclosure of the mortgage of 1867, was incorporated under Section 1234 of the Code and at that time the Legislature (even if it so desired and so attempted in the clearest terms) had no power to grant a perpetual exemption from taxation.[100]

In the last taxation case, a corporation (in order to escape the payment of certain taxes) claimed that its corporate life had

[97] 103 Va. 337, quoted with deadly effect in Norfolk, etc., Co. *v.* City of Norfolk, 105 Va. 139, 141.

[98] 7 Cranch 165.

[99] 114 U. S. 176.

[100] The Court conceded the inviolability of the original contract with the old company but denied that this immunity passed to the present corporation.

been automatically extinguished by its failure to pay registration fees and its omission to make annual reports.[101] But to the corporation's "Come death and welcome, since Juliet wills it so", the State (following the example of Juliet) refused to will it so by stoutly and successfully (before both Court and Commission) insisting that there had been no automatic forfeiture. The death provided by the Constitution for corporations remiss in fees and reports, said the Court, is not self-executory. The State (in good equitable style) abhors a forfeiture, and, even if its officers are guilty of neglect in assessing fees and requiring reports, there is no such estoppel against the State as to change its Constitution and Statutes. The Court found fault, too, with the corporation's having continued to do business as such after, according to its claim, it had automatically ceased to exist. Such a literal (and corporate) interpretation of scriptural admonition: "In the midst of life we are in death" shocked the judicial conscience; so forthwith the Court decreed abundant life to the Iron Company coupled with a present liability for the payment of the taxes.

4. Rates of Public Service Corporations.

(a) *In General.*

The first rate case brought to the Court involved an order of the Commission reducing the rate charged by what is known as a "switching line" from fifty cents per car to twenty-five cents per car.[102] Apart from the question of jurisdiction, one would have expected a more adequate discussion of the rate-making function of the Commission and the review of such rates by the Court. The opinion, however, merely states boldly that the contentions of both appellant that the rate "is too low and the contention of appellee, on cross appeal, that said rate is too high are both without merit"; the Constitutional provision § 156 (f) "the action of the Commission appealed from shall be regarded

[101] Elliott's Knob Iron, etc., Co. *v.* State Corporation Commission, 123 Va. 63. Compare Jeffries *v.* Commonwealth, 121 Va. 425 (previously discussed).

[102] Norfolk & Portsmouth Belt Line Ry. Co. *v.* Commonwealth, 103 Va. 289.

as *prima facie* just, reasonable and correct",[103] is quoted; we are told, on the authority of a federal case,[104] that "the Commissioners are presumed to be experts in the matter of rates and charges, and that their findings are entitled to peculiar weight"; and we must take the Court's word that "aside from these considerations the evidence fully sustains the judgment of the Commission".[105]

The Commission played a somewhat unusual rôle in *Commonwealth* v. *Atlantic Coast Line Ry. Co.*,[106] when acting judicially it in no uncertain tone declined to enforce duties expressly conferred on it by a Virginia statute and promptly declared the statute (known as the "Virginia Mileage Act") in violation of the United States Constitution. Here, with a vengeance, was Commission review of rate-making by the Legislature. The Act sought to compel steam transportation companies to keep on sale at all times at each and every station mileage books of five hundred miles and over at a charge of not more than two cents a mile. Further the Act specified the persons who might use a single mileage book, as well as the forms and final period of redemption. The Court unanimously sustained the Commission, basing its decision chiefly on *Lake Shore, etc., Ry. Co.* v. *Smith*[107] in which the U. S. Supreme Court held void a similar statute of Michigan. The Virginia Mileage Act was held to discriminate in favor of the wholesale buyer, to invade the carrier's right to conduct its own affairs, to deny the carrier the equal protection of the laws and to deprive the carrier of property without due process of law!

A single decision involves the validity of railroad rates fixed

[103] Citing Newport News, etc., Ry. Co. *v.* Hampton, etc., Ry. Co., 102 Va. 847 [Previously discussed].

[104] East Tenn., etc., Co. *v.* Interstate Commerce Commission, 99 Fed. 52, 39 C. C. A. 413.

[105] 103 Va. l. c. 297.

[106] 106 Va. 61.

[107] 173 U. S. 684. The Attorney General of Virginia, appearing for the Commonwealth, frankly conceded the Virginia Act to be unconstitutional unless the Lake Shore Case had been later overruled or unless the Virginia Case could be distinguished. The Virginia Mileage Case is an eloquent tribute to the futility of the regulation of railroad rates by legislatures.

by the Commission.[108] The railroad here, only thirty-six miles long, was of negligible consequence as an intrastate railway but was of tremendous importance from the interstate viewpoint as the link between the northern and southern connections of six great railroad systems. The region traversed by the railroad (beyond the immediate vicinity of the northern terminus) is poor and quite sparsely settled. The intrastate State business of the railroad was utterly inconsiderable, and counsel conceded that a maximum passenger intrastate rate of five cents a mile would not yield a fair return upon the capital invested under any scheme for apportioning the capital on an interstate and intrastate basis. The railroad was thus built, maintained and operated essentially for interstate business. Under these circumstances, in view of statistics showing that the entire passenger business of the railroad in Virginia (both State and interstate) had been done at an average rate at 2.35 cents per mile and its entire passenger business at 2.47 cents per mile, the Commission fixed the maximum intrastate rate at the standard rate upon the chief railroads in Virginia of two and one-half cents per mile, and this was upheld by the Court.

[108] Washington Southern Ry. Co. *v.* Commonwealth, 112 Va. 515. Keith, P., and Cardwell, J., dissented, but filed no dissenting opinion. The majority opinion in this case contains a brief history of the controversy over intrastate railroad rates in which the case of Prentis *v.* Atlantic Coast Line Ry. Co., 211 U. S. 210 was a dramatic episode. It is rather interesting to compare Washington, etc., Ry. Co. *v.* Commonwealth with Commonwealth *v.* Richmond & Rappahannock River Ry. Co., 115 Va. 756 (previously discussed). In the former case, the Court and Commission could not divorce intrastate business (which it could regulate) from interstate business (beyond its jurisdiction). In the latter case, the Commission had jurisdiction only over the line beyond the limits of Richmond but the transfer question could not be considered from the standpoint of a single line; and, accordingly, since the Richmond line had been relieved of the transfer burden, the Commission felt it would be only equitable to grant the same immunity to the suburban line. See also (valuation of franchise involving interstate elements for State taxation) St. Louis, etc., Ry. Co. *v.* Middlekamp (U. S.), 41 Sup. Ct. Rep. 489.

But compare the language of the U. S. Supreme Court in Smyth *v,* Ames, 169 U. S. 466, 541: "In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it."

(b) *Rate Regulation by Municipal Franchises.*

Conflicts between the powers of the Commission and the fixing of rates by contracts between municipal corporations and public service corporations featured at least three rate regulation cases.

In the first of these [109] a company furnishing electric power sought the Commission's approval of a schedule of rates in excess of those fixed in its franchise contract with the municipal corporation. Relief was denied by both Commission and Court on the ground that these contracts (which were within the powers of the municipalities) could not (under the U. S. Constitution) be impaired in their obligation by State action and the Commission was powerless to grant the desired relief even though changed economic conditions rendered it difficult for the corporations to give efficient service under the old schedule of rates.

This litigation, however, formed the basis of the next case.[110] The unimpairable franchise-contract previously considered was (in the instant case) held not to cover day service by the power company. Over this extra-franchise service, then, the Commission had jurisdiction. Accordingly, the power company sought to withdraw such extra-franchise service in Clifton Forge or else to have the Commission fix adequate rates therefor. The Commission refused to permit the withdrawal but fixed the rates according to a schedule filed by the power company. This decision was affirmed by the Court which also refused to warm up any cold judicial soup by reconsidering the issues involved in the former appeal.

In *City of Richmond* v. *Chesapeake, etc., Telephone Co.*[111] the apparent situation closely resembled that in the two preceding

[109] Virginia-Western Power Co. *v.* Clifton Forge, 125 Va. 469. The opinion decided similar cases involving the same appellant and the City of Buena Vista and the towns of Covington and Lexington.

[110] City of Clifton Forge *v.* Virginia-Western Power Co., 129 Va. 377, 106 S. E. 400. Though the power company had furnished such day service under the franchise contract, this was held to estop neither the power company from denying that such day service was covered by the contract nor the State (through the Commission) from exercising its police power.

[111] 127 Va. 612.

cases. But here it was held that the City of Richmond had no power thus to prescribe telephone rates by contract. Such power, said the Court, which during its continuance extinguishes the powers of the State over such charges, it is not to be lightly inferred and all doubts as to its existence are to be resolved against the City and in favor of the State. Accordingly, the jurisdiction of the Commission and its order, permitting rates in excess of those specified in the contract between the City and the telephone company, were sustained.

(c) *Valuation of Property as Basis for Rate Making.*

The Petersburg Gas case [112] (the most recent case, at this writing, decided on appeal from the Commission) might well have been remanded (without further discussion) on the ground of the lack of the required certificate of facts and for other defects in the record. But, for the first time in its history (seemingly), the Court felt that it should not only point out certain errors in the Commission's activities but also develop in detail the subject in hand: the valuation of the property of a public utility as a basis for rate-making. If we may believe contemporary legal literature (to say nothing of political history) this is probably the most difficult task now confronting public utility commissions. One is unquestionably well within the bounds of moderate statement in observing that few fields of judicial review have given the courts such trouble.[113] Inherent in the approach to the problem taken by the Courts is the familiar vicious circle: the value of the property must *first* be determined as a basis for fixing the rate to be charged, yet this rate is the chief single factor that gives value to the property. Within the narrow confines of this paper, it will be impossible to suggest even the most obvious of the many plans suggested as the least objectionable es-

[112] Petersburg Gas Co. *v.* City of Petersburg, (decided Feb. 2, 1922).

[113] Take, for example, the celebrated Ben Avon Case. The decision of the Pennsylvania Commission (Pub. Util. Rep. 1917C, p. 390) was reversed by the Pennsylvania Superior Court (68 Pa. Superior Ct. 561); the Superior Court was reversed by the Pennsylvania Supreme Court (260 Penn. 289, 103 Atl. 744); this Court was reversed by the United States Supreme Court (253 U. S. 287); while well informed legal opinion has overwhelmingly reversed the United States Supreme Court.

cape from that vicious circle, Judge Burks, in his opinion in the instant case, reviews at some length the leading American cases,[114] which he concedes to be in almost hopeless confusion. The Commission is criticised for basing its valuation on pre-war figures, and the Court is apparently committed to the so-called cost of reproduction rule. "Several methods have been suggested as helpful in ascertaining the value of property for rate-making purposes. One of these is to take the reproduction cost, less observed depreciation. As a general rule, and where the utility has not been allowed to earn in the past a depreciation reserve greater than the observed depreciation, this seems to be the fairest method and the one best supported by authority".

It is interesting to note that this theory was formerly advanced during a period of falling costs by attorneys for the public and was stoutly resisted by the utilities. Now the period of advancing costs occasioned by the great War has utterly changed this: the consumers insist that the method is essentially unfair, while with equal vigor the utilities (wishing naturally to profit by the great rise in the price of all commodities incident to the war) loudly sing its praises. It is worthy of note that scholars who have given deep study to the problem view the cost of reproduction theory with very scant favor.[115] It is, perhaps, the

[114] Particularly Smyth *v.* Ames, 169 U. S. 466, one of the earliest cases dealing with the subject and a case which has been the target of continuous adverse criticism; San Diego, etc., Co. *v.* National City, 174 U. S. 739 (in support of the doctrine that the value of the property should be fixed as of the time it is being used for the public); Willcox *v.* Consolidated Gas Co., 212 U. S. 52 (value of property should be determined as of the time when the enquiry is made regarding the rates); the Minnesota Rate Cases, 230 U. S. 352 (support of cost of reproduction theory); State Public Utilities Commission *v.* Springfield, etc., Co., 291 Ill. 209 (a modern case which has been quite favorably received, repudiating the cost of reproduction theory). Judge Burks does not cite (though he is doubtless familiar with) the scholarly articles on this subject which have been recently appearing in the leading American law reviews.

[115] See WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS; HALE, VALUATION AND RATE MAKING. See also the following recent articles: 15 Michigan Law Rev. 205, 19 *idem* 849 (Goddard); 34 Quart. J. of Ec. 22 (Vanderblue); 30 Yale Law Journal 710 (Hale); 31 Yale Law Journal 263 (Richberg); 27 Harvard Law Rev. 419 (Whitten); 32 Harvard Law Rev. 516 (Edgerton); 33 Harvard Law Rev. 902, 1031 (Henderson); 22 Columbia Law Rev. 209 (Hale).

least certain of any of the plans generally suggested;[116] the widely varying factors in the application of the rule involve undue complexity;[117] at best an unstable rule, it involves necessarily re-valuations at short and periodic intervals;[118] while, quite apart from difficulties and uncertainties in its operation, the rule does not seem to have in its favor the essential attributes of reasonableness and justice.[119] The hope is accordingly ventured that the cost of reproduction rule shall not be set up as the permanent guiding star to the Commission for its future activities in the difficult, delicate and dangerous task of fixing rates for public utilities.

[*To be continued*]

Armistead M. Dobie.

UNIVERSITY OF VIRGINIA.

---

[116] "A wide and wild field for guessing", 15 Michigan Law Rev. 216 (Goddard); "a new field for speculative estimating, to the increased profit of engineers and lawyers and to the increased confusion of the Courts and Commissions", 31 Yale Law Journal 278 (Richberg); "the conclusion depends on which one of a great number of possible sets of hypothetical conditions we are to assume and the rule gives us no assistance in determining which particular set we are to select", 33 Harvard Law Rev. 1048 (Henderson).

[117] See Detroit *v.* Michigan Ry. Comm., 209 Mich. 395, 177 N. W. 306, cited by Goddard, 19 Michigan Law Rev. 853. "There was a record of over two thousand pages."

[118] "The appraisal is not completed before it is worthless. Present value on such a basis is one thing to-day, another to-morrow and different on every future day", 15 Michigan Law Rev. 220 (Goddard).

[119] See authorities cited in note 115.